6-18-2009

Barrett v. Barrett Respondent's Brief Dckt. 35763

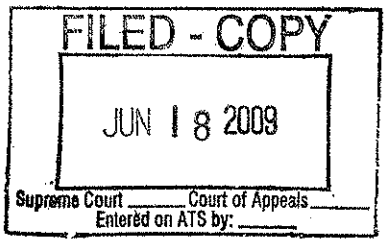
IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY PAUL BARRETT
Plaintiff/Appellant,

vs.

ANN MARIE BARRETT
Defendant/Respondent.

Docket No. 35763



RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR BONNEVILLE COUNTY

HONORABLE JON J. SHINDURLING
District Judge, presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

I. STATEMENT OF THE CASE

The issue in this case pertains to the classification of real property, in a divorce action. The real property is located in Etna, Wyoming, and it has been referred to in this case as the "Etna property". A trial was held between Appellant, Gregory Paul Barrett (hereinafter, "Greg"), and the Respondent, Ann Marie Barrett (hereinafter, "Ann") on June 18, 2007 through June 22, 2007. The Magistrate entered his Findings of Fact and Conclusions of Law on Property and Debt Division and Attorneys Fees, along with his Judgment and Order on All Remaining Issues (property and debt division and attorneys fees) on September 11, 2007. In said decisions, the Magistrate ruled that the Etna property was transmuted from Ann's separate property to the community property of Ann and Greg.

Ann filed her Notice of Appeal on September 14, 2007. There were numerous Orders entered by the Magistrate after the Notice of Appeal was filed, but none of said Orders are relevant to the pending appeal. This appeal was heard by the Honorable Jon J. Shindurling, District Judge, on July 7, 2008. Thereafter, said District Judge issued his Opinion and Decision on Appeal on August 29, 2008. In said decision, the District Judge reversed the Magistrate's decision that Ann had transmuted her separate property into community property, and he further instructed the Magistrate to consider parol evidence to determine if there was clear and convincing evidence of a transmutation. Greg appealed this decision on October 8, 2008, when he filed his Notice of Appeal. Greg then filed an Amended Notice of Appeal on October 30, 2008.

II. STATEMENT OF FACTS

Ann and Greg were married on November 1, 1997. Tr., V.I, p. 475, L. 8-10. They were divorced, on irreconcilable difference grounds, effective June 22, 2007. R. Vol. I, p. 61-62.

The issues presented on this appeal pertain to real property located in Etna, Wyoming (hereinafter, "Etna property"). Tr., V.I, p. 377, L. 20-23. The property is located just inside the Wyoming border. Tr., V.I, p. 378, L. 2-3. At trial, Ann testified that the Etna property was her separate property. Tr., V.I, p. 378, L. 11-13. Ann acquired the Etna property with her first husband, Kevin Spencer, when they purchased the land during their marriage. Tr., V.I, p. 378, L. 17-21. Ann and Kevin Spencer, received a deed to the property. Tr., V.I, p. 378, L. 22-24; and Plaintiff's exhibit 18 (Warranty Deed Ann and Kevin Spencer received when they acquired the property) Tr., V.I, p. 213, L. 12. Ann and Kevin Spencer were divorced on April 24, 1996. Tr., V.I, p. 378, L. 25; p. 379, L. 1-6. Plaintiff's exhibit 19 is the Decree of Divorce which was entered between Ann and her former husband, Kevin Spencer. Tr., V.I, p. 213, L. 12. In said Decree of Divorce, Ann was awarded the Etna property. Tr., V.I, p. 379, L. 7-10. At the time of Ann's divorce to Kevin Spencer, the Etna property consisted of approximately fifteen (15) acres, a marital residence, a mobile home, a hay shed, and a storage shed, located thereon. Tr., V.I, p. 383, L. 13-16; Plaintiff's exhibit 19; Tr., V.I, p. 382, L. 15-22. After the Decree was entered, Kevin Spencer signed two quitclaim deeds, whereby giving Ann the sole interest in the Etna property. Tr., V.I, p. 379, L. 11-14; Plaintiff's exhibit 20; and Tr., V.I, p. 214, L. 13. The first quitclaim deed was signed on March 31, 1997, and the second quitclaim deed was signed on April 28, 1998. Plaintiff's exhibit 20. The reason for the

second deed was due to the fact that the first quitclaim deed contained an incorrect legal description. Tr., V.I, p. 379, L. 15-20.

Ann and Greg became married on November 1, 1997. Tr., V.I, p. 475, L. 8-10. In August of 1999, Ann sold part of the Etna property to Eric and Dawn Loveland. Tr., V.I, p. 383, L. 21-25; p. 384, L. 1-3. Specifically, Ann sold to the Loveland's two and one-half acres, including her marital residence, for $88,500.00. Tr., V.I, p. 384, L. 10-20. Ann transferred the acreage and the home through a Warranty Deed signed on August 12, 1999, by she and Greg. Tr., V.I, p. 385, L. 5-22; Defendant's exhibit B (Warranty Deed); and Tr., V.I, p. 385, L. 22.

At the time of Ann's divorce to Kevin Spencer, there was a debt due and owing on the Etna property, to Countrywide, in the approximate amount of $126,000.00. Plaintiff's exhibit 19 and 21; Tr., V.I, P. 386, L. 2-15. When Ann sold the two and one-half acres to the Loveland's, Countrywide was owed $122,355.54. Plaintiff's exhibit 22. Thus, when Ann sold the acreage and home to the Loveland's for $88,500.00, there was still a remaining balance owed to Countrywide in the approximate amount of $34,000.00, even after the proceeds from the sale were applied to the Countrywide debt. Tr., V.I, p. 386, L. 8-20; Plaintiff's exhibit 22 (Settlement Statement for the sale of the property to the Lovelands). Ann was required to pay off the Countrywide loan during the closing of the sale of the acreage and home to the Loveland's. Tr., V.I, p. 386, L. 8-20; Plaintiff's exhibit 22. In order to do so, Ann acquired a loan through the Bank of Star Valley, in the amount of $35,881.55, to pay off the remaining balance on the Countrywide loan. Tr., V.I, p. 386, L. 16-20; Plaintiff's exhibit 24 (Promissory Note for the loan at the Bank of Star Valley). Countrywide was

paid in full. Defendant's exhibit D (check to Countrywide).

The closing for the sale of the acreage and home to the Lovelands and the new loan through the Bank of Star Valley took place in one day, on August 12, 1999. Tr., V.I, p. 388, L. 9-18. The closing took place at the Bank of Star Valley in Afton, Wyoming. Tr. V.I, p. 388, L. 19-20. During the closing, Ann, Greg, and a representative from the title company were present. Tr., V.I, p. 388, L. 23-25. Ann and Greg signed dozens of documents. Tr., V.I., p. 389, L. 9-17. Ann did not read each of the documents, and she did not believe that Greg did either, as the documents were presented to the parties too fast. Tr., V.I, p. 389, L. 18-25. Greg admitted that he did not read all of the documents presented at closing. Tr., V.I, p. 718, L. 17-19. The closing lasted for 20 to 30 minutes. Tr., V.I, p. 390, L. 2-3. During the closing, Ann signed a quitclaim deed, which indicated that she was transferring the Etna property to she and Greg, as Tenants by the Entireties. Plaintiff's exhibit 23. Ann was required to sign the quit claim deed to obtain the loan. Tr., V.I, p. 391, L. 2-6. Ann did not recall anything specifically said to she and Greg at the closing, and she did not recall signing the quitclaim deed, which was admitted as Plaintiff's exhibit 23. Tr., V.I, p. 390, L. 4-23. In fact, Ann did not specifically recall signing any of the documents that were signed at closing. Tr., V.I, p. 390, L. 24-25; p. 391, L. 1.

Ann admits that she signed the quitclaim deed which was admitted as exhibit 23, but she said that she signed it because it was among several documents that she was required to sign. Tr., V.I, p. 391, L. 2-6. Ann did not recall the closing agent giving her any explanation of the meaning of the quitclaim deed. Tr., V.I, p. 391, L. 7-9. Ann testified that if she had been told that the quitclaim

deed was effectively giving Greg a one-half interest in the Etna property, she would not have signed it. Tr., V.I, p. 391, L. 10-20. Ann, by signing the quitclaim deed, did not intend to give Greg a one-half interest in the Etna property. Tr., V.I, p. 391, L. 21-24. Greg did not object to any of this evidence being presented on parol evidence grounds. Tr., V.I., p. 391.

Prior to signing the documents at closing, Ann and Greg never discussed that Ann was giving Greg an interest in the Etna property. Tr., V.I, p. 392, L. 4-11; Tr., V.I, p. 718, L. 20-25. Greg, again, did not object to any of this evidence being presented on parol evidence grounds. Tr., V.I., p. 392-393. After closing, Ann and Greg did not discuss the fact that Ann had potentially given Greg a one-half interest in the Etna property. Tr., V.I, p. 392, L. 12-18; Tr., V.I, p. 718, L. 20-25. The first time Greg brought up the fact that he may have an interest in the Etna property, was after this Divorce action was filed. Tr., V.I, p. 392, L. 19-25; p. 393; L. 1-6; Tr., V.I, p. 719, L. 21-25; p. 720, L. 1-5; Tr., V.I, p. 695, L. 9-12.

During marriage, Greg did not take much of an interest in the Etna property. Tr., V.I, p. 393, L. 10-11 and 23-25. From the date of marriage until the closing date in August, 1999, Ann paid the mortgage payment to Countrywide and the homeowner's insurance, all from her separate checking account. Tr., V.I, p. 394, L. 8-25; p. 395; p. 396, L. 1-23. The monies she used to pay these expenses were from her child support from her previous marriage, the rental income she was receiving from her separate property, and from a small allowance given to her by Greg. Tr., V.I, p. 394, L. 8-25; p. 395; p. 396, L. 1-23. Ann continued to make the mortgage payment on the Etna property, from her separate bank account, from the date of closing until the winter of 2003. Tr., V.I,

p. 396, L. 24-25; p. 397, L. 1-23. Thereafter, the parties had a joint account, but Ann continued to make the mortgage payment to the Bank of Star Valley, with the exception of one or two instances where Greg made the mortgage payment. Tr., V.I, p. 400, L. 7-11. During the entire marriage, Ann always felt that this debt was her obligation, and Greg never offered any help in paying this debt. Tr., V.I, p. 399, L. 17-25; p. 400, L. 1-6. No parol evidence objection was made by Greg in regard to the aforementioned facts. Tr., V.I, p. 393-400.

In December, 2005, Ann sold approximately 2 acres of the Etna property to Wyoming One Hundred, LLC. Tr. V.I, p. 401, L. 14-21. This acreage was part of the 15 acres Ann owned before marriage. Tr., V.I, p. 413, L. 1-6. In exchange for the sale of the approximately 2 acres, Ann received $49,322.19 and she was supposed to have five lots developed on her property, along with various other improvements. Tr. V.I, p. 403, L. 1-16; Defendant's exhibit G; Tr. V.I, p. 404, L. 12-25; p. 405; p. 406; p. 407, L. 1-20; Plaintiff's exhibit 27. None of the improvements that were supposed to be made, had been begun, pursuant to the agreement with Wyoming One Hundred, LLC, and the time period within which they were to have begun, had long expired. Tr., V.I, p. 405; p. 406; p. 407, L. 1-20. The proceeds received from the sale of the approximate 2 acres were placed into Ann's attorney's trust account. Tr., V.I, p. 401, L. 22-25; p. 402, L. 1-24; Defendant's exhibit F; Plaintiff's exhibit 31. The parties agreed that the sale of the parcel of property to Wyoming One Hundred, LLC, would have absolutely no effect on the classification of the proceeds (separate property vs. community property) from the sale of said property, nor the remaining parcel of the Etna property which was not being sold. Defendant's exhibit F. Ann and Greg, through counsel, agreed

that some of the funds held in Ann's attorney's trust account could be used for various expenses incurred by the parties during this divorce action. Tr., V.I, p. 412, L. 20-25; p. 413, L. 1-9. The remaining balance in said trust account totaled $42,668.24, at the time of trial. Tr., V.I, p. 413, L. 10-23.

When Ann received the property in her Divorce to Kevin Spencer, the Etna property was worth $160,000.00. Tr., V.I, p. 380, L. 7-18; Plaintiff's exhibit 19. At trial, Ann testified that the Etna property was now worth $350,000.00, and that the increase in value was due to natural appreciation. Tr., V.I, p. 381, L. 2-25; p. 382, L. 1-3. Even Greg's expert witness, Tom Ogle, who was hired to appraise the real property, agreed that the Etna property was worth $350,000.00, as of September 19, 2006, the date of his appraisal. Tr., V.I, p. 333, L. 5-6. He also testified that the jump in value, from at least 2002, through the date of the appraisal, was due to natural appreciation. Tr., V.I, p. 345, L. 7-24. The only changes made to the Etna property during the parties' marriage were upkeep and repairs, with no significant improvements. Tr., V.I, p. 382, L. 4-14. A gate was put onto the property by Greg, however, the same was minimal, and it was constructed at a minimal cost. Tr., V.I, p. 414, L. 22-25; p. 415; p. 416; p. 417; p. 418; p. 419, L. 1; Defendant's exhibit H. Ann remarked that the contract which was admitted as Plaintiff's exhibit 27, and which required Wyoming One Hundred, LLC to improve the five lots on Ann's property, has no added value to the Etna property, as the contract is worthless. Tr., V.I, p. 616, L. 5-25; p. 617, L. 1-16. Tom Ogle agreed with this, as he opined that it was too speculative to give a value to the potential subdivision. Tr., V.I, p. 347, L. 10-25; p. 348.

At the time of trial, the Etna property consisted of approximately 10 acres, a mobile home, a hay shed, a storage shed, and a small corral. Tr., V.I, p. 383, L. 13-16; Tr., V.I, p. 382, L. 15-22. All of the structures on the Etna property which were located on said property at trial, were there when Ann received the property from Kevin Spencer, with the exception of the small corral. Tr., V.I, p. 382, L. 20-22.

The balance of the loan owed to Countrywide as of the date of marriage was $123,960.94. Tr., V.I, p. 214, L. 22-25; p. 215, L. 1-21; Plaintiff's exhibit 21. The balance of the loan owed to Countrywide as of the date the loan was paid off, during the closing in August, 1999 was $121,819.55. Tr., V.I, p. 214, L. 22-25; p. 215, L. 1-21; Plaintiff's exhibit 21. The original balance on the debt owed to the Bank of Star Valley was $35,881.55. Plaintiff's exhibit 24. The debt owed to the Bank of Star Valley on or about the date of divorce was $23,086.19. Tr. V.I, p. 400, L. 14-25; p. 401, L. 1-13; Defendant's exhibit E.

In the Court's September 11, 2007 Findings of Fact and Conclusions of Law on Property and Debt Division and Attorneys Fees, the Magistrate found that the signing of the quitclaim deed (Plaintiff's exhibit 23) transmuted the Etna property, which was Ann's separate property, into community property. R. Vol. II, p. 166-171. The Magistrate further found that the proceeds held in Ann's attorney's trust account were community property, for the same reasons the Etna property was found to be community property. R. Vol. II, p. 171. From this decision, Ann filed her Notice of Appeal on September 14, 2007. R. Vol. II, p. 181.

Oral argument on Ann's appeal, was made to the Honorable Jon J. Shindurling, District

Judge, on July 7, 2008. R. Vol. II, p. 255. On August 29, 2008, the District Court entered his Opinion and Decision on Appeal. R. Vol. II, p. 257. In said Opinion, the District Court reversed the Magistrate's decision regarding the classification of the Etna property and the funds held in Ann's attorney's trust account. R. Vol. II, p. 265. He further instructed the Magistrate to consider parol evidence before determining whether there was clear and convincing evidence of a transmutation of Ann's separate property into community property. R. Vol. II, p. 264.

On September 17, 2008, the Magistrate entered his Additional Findings of Fact and Conclusions of Law on Property and Debt Division Following Remand. R. Vol. II, p. 267. In said decision, the Magistrate, when looking at parol evidence, concluded that the Etna property and the proceeds held in Ann's attorney's trust account were Ann's separate property. R. Vol, II, p. 268. The Magistrate subsequently withdrew his Additional Findings of Fact and Conclusions of Law on Property and Debt Division Following Remand when he entered his Order Withdrawing "Additional Findings of Fact and Conclusions of Law on Property and Debt Division Following Remand". R. Vol. II, p. 289. This order was entered due to the fact that the Magistrate prematurely entered his Additional Findings of Fact and Conclusions of Law on Property and Debt Division Following Remand. R. Vol. II, p. 289.

Greg appealed the District Court's decision on October 8, 2008. R. Vol. II, p. 274. He subsequently filed an Amended Notice of Appeal on October 30, 2008. R. Vol. II, p. 284.

III. RESTATEMENT OF ISSUES

Ann's restatement of the issues on appeal are as follows:

1. Whether the District Court was correct when he held that the Magistrate must consider parol evidence in determining whether Greg had proven, by clear and convincing evidence, that a transmutation of Ann's separate property had occurred during a refinance?
2. Whether this case should be remanded to the Magistrate to determine if the facts surrounding the execution of the quitclaim deed justifies an unequal property division, even if the Magistrate was correct in his decision to not consider parol evidence in deciding that a transmutation of Ann's separate property had taken place?
3. Whether Ann is entitled to attorney fees and costs for being required to defend this appeal?

IV. STANDARD OF REVIEW

When reviewing the decision of the district court acting in its appellate capacity, the Supreme Court reviews the district court's decision. Kraly v. Kraly, 2009 WL 1163408 (2009). When reviewing a decision of the District Court acting in its appellate capacity, the Supreme Court will review the record and the Magistrate Court's decision independently of, but with due regard for, the district court's decision. Losser v. Bradstreet, 145 Idaho 670, 672 (2008).

The characterization of property, will not be upheld if the record demonstrates an abuse of discretion by the trial court. Matter of Eliasen's Estate, 105 Idaho 234, 238 (1983). The division of community property is subject to the sound discretion of the trial court, but the trial court's determination will not be upheld if there has been a clear showing of an abuse of discretion.

Hoskinson v. Hoskinson, 139 Idaho 448, 458 (2003).

The Supreme Court exercises free review over questions of law. Brooks v. Brooks, 119 Idaho 275, 277 (Idaho App. Ct. 1990).

V. ARGUMENT

1. The District Court was correct when it held that the Magistrate must consider parol evidence in determining whether Greg met his burden of showing that a transmutation took place when Ann signed a quitclaim deed during a refinance.

The Magistrate found that by Ann's execution of the quitclaim deed (Plaintiff's exhibit 23), she transmuted her separate property interest into community property, despite the fact that this was done during a refinancing situation. The Magistrate thus found that the Etna property and the proceeds in Ann's attorney's trust account from the sale of a part of the Etna property to Wyoming One Hundred, LLC, were community property. The District Court reversed this determination and directed the Magistrate to consider parol evidence before determining whether there was clear and convincing evidence of a transmutation of separate property to community property. The District Court's decision must be upheld.

a. Greg failed to object to the admission of parol evidence at trial, and thus, he has waived his parol evidence objection on appeal.

It is well settled that this Court will not consider issues pertaining to the admission of evidence where no objection was raised to admission at trial. Kraly v. Kraly, 2009 WL 1163408 (2009). In Kraly, wife argued that a warranty deed unambiguously identified real property as community property, and therefore, it is dispositive as to the property's character. Id. The husband argued that his wife had waived her parol evidence objection by failing to object at trial to the

admission of evidence tracing the source of the funds used to purchase said property. Id. The Supreme Court ruled that since the wife did not raise the parol evidence objection, she had waived her right to now do so on appeal. Id.

In this matter, Greg argues, constantly, in his brief, that the parol evidence rule bars Ann from presenting evidence of the parties' intent regarding the entering into of the quitclaim deed. However, Greg failed to object to said evidence at trial. Thus, the record is replete with evidence regarding the parties' contrary intent regarding the execution of the quitclaim deed, and the Magistrate must consider the same, as found by the District Court.

Ann testified that if she had been told that the quitclaim deed was effectively giving Greg a one-half interest in the Etna property, she would not have signed it. She further testified that by signing the quitclaim deed, she did not intend to give Greg a one-half interest in the Etna property. Prior to signing the documents at closing, Ann and Greg never discussed that Ann was giving Greg an interest in the Etna property, and after closing, Ann and Greg did not discuss the fact that Ann had potentially given Greg a one-half interest in the Etna property. In fact, the first time Greg brought up the fact that he may have an interest in the Etna property, was after this Divorce action was filed. Ann also felt that the repayment of the refinanced debt was her responsibility. All of this parol evidence must be considered by the Magistrate, due to Greg's failure to object to the admission of the same at trial.

b. Hoskinson v. Hoskinson controls, and thus, parol evidence must be considered in the facts before this Court.

The Idaho Supreme Court has addressed the very issue pending in this case, in Hoskinson v.

Hoskinson, 139 Idaho 448 (2003). In Hoskinson, the Idaho Supreme Court upheld the Magistrate's determination that, despite a deed executed by husband, whereby he conveyed his separate property interest in certain real property to himself and his wife, during a refinance, the property remained husband's separate property. The facts in Hoskinson are strikingly similar to those in the present case, as can be seen by the Supreme Court's rendition of the Magistrate's findings:

> In 1998 Reed's home was the subject of two separate quitclaim deeds. In one deed Elizabeth conveyed her interest in the property to Reed. In the other deed Reed conveyed his interest in the same property to himself and Elizabeth, as "husband and wife." Both deeds were signed and notarized on January 23, 1998. The conveyance from Elizabeth to Reed was recorded the same day. The conveyance from Reed to himself and Elizabeth was recorded on February 9, 1998. Elizabeth claims that the second conveyance transmuted Reed's property from separate to community property.
> . . .
>
> Here, the parties offered conflicting evidence of the intent behind the quitclaim deeds. Elizabeth testified that Reed asked her to sign a quitclaim deed to facilitate the financing and that she refused to sign until Reed agreed to sign a deed conveying the property to her and Reed. Reed denied that allegation. He testified he signed the quitclaim deed simply because the lender presented it to him during the loan closing, that he signed it along with many other papers the lender presented to him, and that he had no intent to transmute his property into community property. Reed notes that he alone signed the promissory note for the new loan. Under these circumstances, the court finds that Elizabeth has not proved a transmutation by clear and convincing evidence. The evidence did not establish that Reed intended to make a gift to the community. The evidence did not establish whether the deed to Reed and Elizabeth was signed before or after the deed to Reed. As noted above, Elizabeth damaged her credibility with her lack of candor during her testimony on other issues; therefore, the court is inclined to believe Reed's testimony on the issue.

Hoskinson at 459-60.

The important facts to note in Hoskinson, are (1) that the husband signed a deed to his separate property, during a refinance, to himself and his wife; (2) husband signed the deed, along with other documents presented to him at closing; (3) husband did not intend to transmute his separate property into community property; and (4) husband's deed was recorded after the deed wife had signed, whereby conveying her interest in the property to husband. The important legal issue to note in Hoskinson is that parol evidence was considered by the Magistrate to determine whether wife had proven a transmutation of husband's separate property by clear and convincing evidence. The Magistrate's decision was upheld by the Supreme Court.

The facts in Hoskinson, are nearly identical to those in the present case. Ann needed to refinance the Countrywide debt, on her sole and separate property, when she sold a portion of her Etna property to the Lovelands. During the refinancing, she was handed dozens of documents to sign. One of the documents she did sign, was a quitclaim deed which Greg argues, transmuted her separate property interest to she and Greg, into community property. The quitclaim deed was recorded. Ann had absolutely no intention of giving Greg any interest in her separate property. Ann and Greg did not discuss the possibility that Ann was giving Greg a one-half interest in the Etna property before or after Ann signed the quitclaim deed. In fact, the first time Greg brought up the issue that he had a one-half interest in the Etna property, was after the divorce complaint was filed. Greg agreed with all of the aforementioned facts at trial. Greg offered no evidence in support of his claim that Ann's separate property was transmuted, other than the quitclaim deed, itself. Thus, the

facts illustrating that there was no transmutation of Ann's separate property, in this case are even stronger than those in Hoskinson.

The Magistrate, in the matter before this Court, erred in failing to consider the parol evidence listed above, as he was required to do so, pursuant to the Hoskinson decision and as required by the district court. Again, in Hoskinson, the Magistrate considered contrary intent testimony regarding the deeds, in order to determine whether wife had proven a transmutation by clear and convincing evidence. This action was upheld by the Supreme Court. In the case before this Court, the Magistrate found that there was no ambiguity in the deed, and that the deed, itself, transmuted the Etna property from Ann's separate property to community property. Despite the legal doctrine approved of in Hoskinson, the Magistrate failed to consider the facts surrounding the execution of the deed and the parties' intent, and instead, only looked to the deed. This was an error, in light of Hoskinson.

This result is also inequitable. At trial, Ann and Greg's expert testified that the Etna property was now worth $350,000.00. Further, there was $42,668.24 in Ann's attorney's trust account. If the Magistrate's decision is upheld, Ann loses approximately $200,000.00, of her separate property[1]! The only reason for this loss, would be because she refinanced a debt on her separate property and

[1] It is acknowledged that there would still be a community property interest, even if Ann prevails, but it will be minimal compared to the $400,000.00 community property interest the Magistrate has allowed for. In fact, in Ann's Proposed Findings of Fact and Conclusions of Law, she argues that the community is entitled to an interest in the amount of $8,283.05. R. V. I, p. 82-85. This amount was arrived upon by taking into account the reduction in principal on the loans, during marriage (see Gapsch v. Gapsch, 76 Idaho 44, 53 (1954)), less the reimbursement to Ann from the community for the use of her separate property monies held in her attorney's trust account.

signed a document which was required to be signed by the Title Company. This is simply not right, and Greg should not receive this windfall.

i. The Magistrate's attempt to distinguish Hoskinson is not persuasive.

In his Findings of Fact and Conclusions of Law on Property and Debt Division and Attorneys Fees, the Magistrate attempts to distinguish the present case from Hoskinson, but his argument is not persuasive. The Magistrate states as follows:

> In Hoskinson, two deeds were signed on the same day: the husband signed one deed purporting to convey the property to himself and the wife; the wife signed the second deed conveying the property to the husband. The evidence did not establish which deed was signed first.

Those facts were cited to in the Supreme Court case of Hoskinson. However, the Magistrate then continues in his Findings of Fact and Conclusions of Law on Property and Debt Division and Attorneys Fees, as follows:

> The deeds contradicted each other. Because the language of the deeds was not "plain and unambiguous," the court could not "determine the intention of the parties . . . from the deed itself." Hall v. Hall, 116 Idaho 483, 484, 777 P. 2d. 255, 256 (1989). The ambiguity created by the dual deeds, justified the court's considering parol evidence of the parties' intent. See Hall v. Hall, supra. That parol evidence led the court to find that the parties intended no transmutation.

None of this analysis was cited by the Supreme Court in Hoskinson. Thus, this analysis cannot be relied upon in distinguishing Hoskinson from the present case. In Hoskinson, the Supreme Court upheld the Magistrate's consideration of the parties' intent in determining whether the wife had proved a transmutation by clear and convincing evidence, in the factual scenario whereby a quitclaim deed is signed on a spouse's separate property, during a refinance.

This is not a situation where a deed is given during a purchase or an attempt to transfer property between spouses. Rather, this is an all too common occurrence, whereby one spouse is required to sign a quitclaim deed regarding their separate property, to husband and wife, during a refinance. A spouse should not lose his/her separate property interest in this scenario, simply based upon the execution of a quitclaim deed, which was required to be signed by a third party. The Supreme Court's ruling in Hoskinson is equitable and resolves this problem, by requiring a Magistrate to review not only the deed, but also, the facts surrounding the entering into of the deed, as well as the parties' intent, even if it is contrary to the terms of the quitclaim deed.

Even assuming that the analysis presented by the Magistrate in his attempt to distinguish Hoskinson can be considered, it is not correct. The fact that there were two deeds, does not mean that they were ambiguous, and thus, parol evidence could be considered. Both deeds in Hoskinson were executed and recorded. The deed from husband to husband and wife was recorded after the deed from wife to husband. This scenario, is actually much clearer than the factual scenario in the case at hand. By signing two deeds, it is clear that the parties had discussions regarding how the property was to be titled. Further, the deed granting the property to both parties was recorded after the deed from wife to husband. There is no ambiguity in that factual scenario, and this further illustrates that the Magistrate is incorrect in attempting to distinguish the current case from Hoskinson.

c. The parol evidence rule cannot act as a bar to the admission of contrary intent evidence during a refinancing situation.

Idaho law is clear that where one spouse claims that the other spouse intended to transmute

property or to make a gift, the burden is on the party making the claim to prove the intent in question by clear and convincing evidence. Ustick v. Ustick, 104 Idaho 215, 222 (1983). Under the Magistrate's analysis, all a court would need to look to in determining whether a transmutation took place is a deed from one spouse to both spouses. This cannot be enough in the refinancing situation before this Court.

If the parol evidence rule can be used to prohibit intent testimony in the situation before this Court, as ruled by the Magistrate, then the clear and convincing standard is essentially eradicated, as the Court would only need to see if a deed was signed, regardless of the facts surrounding the execution of the same. It is admitted that this exception to the parol evidence rule should be limited to the refinancing situation, as illustrated in this case and Hoskinson. The reason for this exception is because there is generally no intention to transmute a spouse's separate property to community property, during the refinance. Rather, the intent is to pay off an existing loan with a new loan. However, there may be a scenario, whereby the spouse refinancing does intend to transmute his/her separate property to community property during a refinance. This is why intent evidence, even if contrary to the terms of the deed itself, must be reviewed in this scenario.

A similar analysis was performed by the Minnesota Court of Appeals in Berry v. Breslain, 352 N.W,. 2d 516 (1984). In this case, wife owned a home before marriage, and during marriage, the home was deeded to husband and wife in joint tenancy. Id. at 517. The trial court found that "this was done for the purpose of persuading the mortgagee bank not to invoke its 'due on sale' clause by extending the credit of respondent upon the mortgage obligation." Id. The trial court awarded title

to the real property to wife, as her property. Id. The Minnesota Court of Appeals upheld this decision, when it stated the following:

> The court's finding that title was transferred to joint tenancy to avoid invoking the due-on-sale clause strongly suggests that the sole reason for its transfer was security. There is support in the record for the implicit finding that there was no intent to create a bona fide joint tenancy.
> . . .
>
> Appellant's home purchased before the marriage, with an increase in value due primarily to economic conditions and with title in a joint tenancy with husband created primarily to ensure security on the mortgage, is nonmarital property and was properly awarded to appellant in its entirety.

Id.

This is the correct analysis. The refinancing situation is not the same as a deed signed between spouses. The deed in the refinancing situation is required to be signed by a third party. It is not a deed which is typically prepared at one of the parties' request. Thus, parol evidence must be considered in this scenario.

d. Greg's statutory arguments are incomplete and incorrect.

Greg argues in section 1. of the argument section of his brief, that he should prevail as the quitclaim deed from Ann to Greg complied with the statutory requirements for conveyances of real property and transfers between spouses. Essentially, Greg makes three (3) different statutory arguments. First, he argues that pursuant to Idaho Code §55-601, et seq., the quitclaim deed is conclusive against Ann. Second, Greg argues that Idaho Code §32-906(2) applies to this case, and since Ann signed the quitclaim deed, it is presumed that she conveyed to Greg a separate property

interest in the Etna property. And finally, Greg argues that pursuant to Idaho Code §32-916, et seq., Ann's execution of the quitclaim deed is a valid marital settlement agreement which transmuted Ann's separate property into community property. All of these arguments must fail.

i. Idaho Code §55-601, et. seq. is not dispositive of the issue before this Court.

Idaho Code §55-606 does state that "a conveyance of an estate in real property is conclusive against the grantor". However, this rule, alone, does not answer the question in a marital, refinancing, situation. First of all, as stated previously, in Hoskinson v. Hoskinson, 139 Idaho 448 (2003), the Idaho Supreme Court upheld the Magistrate's determination that despite a deed having been executed by husband, whereby he conveyed his separate property interest in real property to himself and his wife, during a refinance, the property remained husband's separate property. Second of all, in cases involving spouses, in order to prove a transmutation of property or a gift, the burden is on the party making the claim to prove the intent in question by clear and convincing evidence. Ustick v. Ustick, 104 Idaho 215, 222 (1983). If parol evidence is not reviewed in the refinancing situation, then there is a great injustice done to the clear and convincing evidentiary standard, regarding transmutations and gifts between spouses. It is simply not right for a spouse who is refinancing a debt on his/her separate property, to lose his/her separate property, simply because they signed a quitclaim deed (required to be signed by a third party) granting the property to both spouses. The Court must look to the surrounding circumstances and the intent of the parties' to determine, during the refinancing, whether the spouse who signed the quitclaim deed intended to create a community property interest, or rather, as is the case here (and in Hoskinson), whether the spouse

was merely attempting to refinance a loan owed on her separate property, with no intent to transfer an interest to both spouses. Third, Barmore v. Perrone, 179 P.3d 303 (2008) is dispositive, as despite a properly executed quitclaim deed from husband to wife, the intent of the parties' was reviewed to determine whether delivery of the deed was intended; or in other words, whether the grantor had the "intent to convey immediately". The Court did not only look to the deed, in Barmore.

ii. Idaho Code §32-906(2) merely creates a presumption, and is not dispositive of the issue before this Court.

Idaho Code §32-906(2) merely creates a presumption, when the deed is signed. Idaho Code §32-906(2) (2007) and Bliss v. Bliss, 127 Idaho 170, 174 (1995). This shifts the burden to the other party, pursuant to IRE Rule 301, to come forward with evidence to rebut the presumption, although the party who is seeking to prove the transmutation continues to carry the burden of persuasion. Bliss at 174.

The effect of the statutory presumption under IRE Rule 301 is that the party in whose favor the presumption operates is relieved from having to adduce further evidence of the presumed fact until the opponent introduces substantial evidence of the nonexistence of the fact. Id. Here, Greg met his initial burden, with the quitclaim deed, and thus the presumption of Idaho Code §32-906(2) would work in his favor. Thereafter, it would be Ann's obligation to come forward with evidence to rebut the presumption. She can clearly do so.

All of the evidence illustrates that there was no intent to transmute Ann's separate property into community property. Ann was required to refinance the Countrywide debt, on her sole and separate property, when she sold a portion of her Etna property to the Lovelands. During the

refinancing, she was handed dozens of documents to sign, and she did not even remember signing the quitclaim deed. The deed was required to be signed in order to obtain the loan. Ann had absolutely no intention of giving Greg any interest in her separate property. Ann would not have signed the quitclaim deed had she known that she was giving Greg a one-half interest. Ann and Greg did not discuss the possibility that Ann was giving Greg a one-half interest in the Etna property before or after Ann signed the quitclaim deed. In fact, the first time Greg brought up the issue that he had a one-half interest in the Etna property, was after the divorce complaint was filed. Greg agreed with all of the aforementioned facts. Greg offered no evidence in support of his claim that Ann's separate property was transmuted, other than the quitclaim deed, itself.

All of this evidence must be considered, despite the fact that it may be parol evidence, for all of the reasons argued throughout this brief. When it is considered, it is clear that Ann has rebutted the presumption. Greg is then left with the burden of persuasion, and he cannot meet this burden, as all of the evidence is in Ann's favor.

This analysis has found favor in at least one other state. In Larman v. Larman, 991 P.2d 536 (1999), the Oklahoma Supreme Court addressed this issue. In said case, wife inherited property known as the "Churchill property" during marriage. Id. at 538. After she inherited the property, wife sought to refinance the loan on said property to lower the interest rate and the monthly payment. Id. In order to obtain said refinancing, wife had to place title to the properties in the names of both spouses as joint tenants. Id. The trial court found that the Churchill property was marital property and awarded the same to husband due to the signing of the deed. Id. The Oklahoma Supreme Court

overruled the trial court and held that despite the signing of a deed from wife to husband and wife as joint tenants, the real property remained wife's non-marital property. Id. at 542. The Oklahoma Supreme Court's analysis is important for this case, when it states as follows:

> Gifts of realty are governed by the principles of personal property law. An essential element of a gift is the donor's intent gratuitously to pass the title to done. A transfer by one spouse of separate property to another does not by itself erase the separate character of the asset (or the real property transferred). The original ownership regime must be respected unless there is proof of an interspousal gift.
> ...
>
> Oklahoma's extant jurisprudence allows a rebuttable presumption of a gift where title to separately held real estate is placed by one owner-spouse in both spouses' names as joint tenants. If a joint tenancy deed facially effects an unconditional transfer, it is deemed to be a presumptive interspousal gift, whose effect can be overcome by clear and convincing evidence of a contrary intent.
> ...
>
> Where, as here, the record shows that title was passed without intent to invest the spousal grantee with an interest in the property, but rather for a purpose that is clearly collateral to any intended change in the existing ownership regime, the conveying marital partner will not be deemed to have made an unconditional, presently effective interspousal gift of separate property. The burden would then shift to the done (grantee) spouse to prove the factum of a gift in praesenti.

Id. at 540-541.

After citing this law, the Oklahoma Court then focused on the facts of the case at hand. Wife argued that she did not intend to make a gift to the husband, and that she had included husband's name upon the deed as a joint tenant for the sole purpose of refinancing the mortgage loan in an effort to secure a lower interest rate and reduced monthly payments. Id. at 541. The lending

institution required both names on the deeds, and they prepared all of the documents signed by husband and wife. Id. Husband had no idea that he had a claim of ownership until after the divorce action was commenced. Id. After reciting these material facts, the Oklahoma Supreme Court held as follows:

> In short, where, as here, the "owning spouse" is unable to refinance mortgaged property because the lender requires that, in order to qualify for a loan, both spouses be record owners and sign the loan-related documents, the presumption of a gift (arising from a joint-tenancy ownership regime) is overcome.
>
> We hence hold that on this record, absent any contrary proof, the transfer to the husband by a joint tenancy deed clearly was not intended to constitute a gift in praesenti-a presently effective, unconditional interspoual gift to the husband.

Id.

iii. A quitclaim deed signed during a refinancing is not executed with the same formalities as a transmutation agreement or marital settlement agreement.

Greg's last statutory argument is that the execution of the quitclaim deed is a valid marital settlement agreement, and thus, Ann transmuted her separate property into community property. Idaho Code §32-917 defines the requirements for a valid marriage settlement agreement between spouses. I.C. §32-917 (2007). The requirements of I.C. §32-917 are also used to determine whether there has been a valid transmutation agreement. Stockdale v. Stockdale, 102 Idaho 870, 873 (Idaho Ct. App., 1982). The Idaho Supreme Court in Stevens v. Stevens, 135 Idaho 224, 227-28 (2000), defines a marriage settlement agreement as a prenuptial agreement or an agreement being made with an eye towards separation and/or divorce. Likewise, a transmutation agreement, is an arrangement

between spouses which changes the character of their property from separate to community and vice versa. Stockdale at 872.

Both of these documents are formal documents entered into by husband and wife. Usually, they are prepared by husband or wife, or their respective attorneys. Typically, they are lengthy documents which specifically define the property rights being given to the other spouse or to both spouses. Based upon the formality and completeness of these documents, the clear and convincing evidentiary standard is met, once they are entered into. Conversely, the signing of a quitclaim deed, during a refinance, which purports to transfer one spouse's separate property interest to both spouses, as community property, is quite different.[2] The quitclaim deed, is often not read during the closing, and it contains standard, boilerplate language, as was the case between Ann and Greg. Thus, in the refinancing scenario, there should be more of a requirement than merely complying with I.C. §32-917, in determining whether a spouse has proven a transmutation by clear and convincing evidence. That additional requirement, is to look to all of the facts surrounding the entering into of the quitclaim deed during the refinance, and the intent of the parties regarding the signing of the quitclaim deed during the refinance. To find otherwise, as the Magistrate did in this case, merely serves to potentially punish a spouse, who is attempting to refinance her separate property, when not

[2] It is acknowledged that a deed signed by one spouse to the other, not during a refinancing situation, is a valid transmutation. See Bliss. Further, a deed signed by one spouse, regarding that spouse's separate property, to both spouses, not during a refinance, would be a valid transmutation. However, this is much different than a deed *signed during a refinance*. The purpose of the transaction when there is no refinance, is to transfer the real property. The purpose during a refinancing may be to only obtain a loan, or it may be to obtain a loan and to transfer the property. This is why the holding in Hoskinson is correct, because it requires a Court to look at the intent of the parties, in the refinancing situation, to determine whether the party arguing for a transmutation has met their burden by clear and convincing evidence.

only was there no intent to transmute their separate property into community property, but rather, they may not even know that they signed the quitclaim deed.

e. The case law cited to by Greg does not prohibit the Magistrate from considering parol evidence in the case at hand.

In part of the Magistrate's decision, he cites to Hall v. Hall, 116 Idaho 483 (1989) and Bliss v. Bliss, 127 Idaho 170 (1995), for the propositions that generally, a quitclaim deed executed with the formalities required by Idaho Code §32-917 are sufficient to meet the burden that the spouse intended to transmute their property into community property and further, where the language of a deed is plain and unambiguous, the intention of the parties must be determined from the deed itself, and parol evidence is not admissible to show intent. Greg cites to this authority in his brief, as well. These two cases are clearly distinguishable.

In Hall, husband and wife acquired a ranch from husband's grandparent's for $60,000.00. Hall at 483. At trial, husband's grandmother testified that at the time of the sale, the ranch was worth $100,000.00 and that the value above the $60,000.00 purchase price was a gift. Hall at 484. The deed specifically said "for value received", and thus, the testimony provided by husband's grandmother directly contradicted the language of the deed. Hall at 484. The Supreme Court held that "where, as here, the consideration clause clearly recites that the transfer was made "For Value Received," parol evidence is not admissible to contradict the deed by attempting to show the transfer was in part a "gift" rather than "for value". Id. Hall dealt with a factual pattern regarding a purchase and sale of real property. Hoskinson and the present case pertain to a refinancing scenario. These are completely two different factual scenarios. During a purchase, it is understood that both spouses

are acquiring an interest in property when their names are placed on a deed. This is not the case during a refinance, where the sole purpose of the transaction is usually to obtain a loan and not to alter the title to the property. Further, Hall dealt with a husband arguing that despite what the deed said regarding consideration, he should be able to present additional evidence regarding an alleged gift. This is not the factual scenario in Hoskinson nor the facts before this Court.

In Bliss, husband granted forty-eight acres to wife, and the deed was recorded. Bliss at 174. The deed stated, in pertinent part, "THE GRANTOR, GORDON F. BLISS, a married man, . . . for and in consideration of ONE DOLLAR and OTHER GOOD and VALUABLE CONSIDERATION, conveys and quit claims to ALTHEA BLISS, a married woman, *as her separate property*, whose address is . . ., the following described real estate. . . (italics added, capitalization original)." Id. At trial, the husband testified that he signed the deed because he was trying to shelter the property from the IRS. Id. The Supreme Court held that husband's statements were not admissible to contradict the deed's clear language. Id. Again, the facts in Bliss are entirely different from the facts in Hoskinson and the present case. In Bliss, husband executed a deed to transfer property to wife as her sole and separate property. He knew that he was transferring the property, even if it was to avoid the IRS. In Hoskinson and the present case, as argued above, the deed was signed during a refinance. Again, there are two entirely separate purposes related to the transactions in Bliss and Hoskinson. In Bliss, the sole purpose of the execution of the deed was to transfer title of the property to wife. Conversely, in Hoskinson, and the present case, the purpose of the underlying transaction was to obtain financing, and not to transfer title to the property. Ann had no knowledge that she was

potentially transferring her separate property into community property. Nor did the husband in Hoskinson.

f. Ann Quitclaimed her separate property to Greg to refinance a loan on her separate property, and not to presently convey title to her separate property, and thus, the Magistrate must consider parol evidence.

In Barmore v. Perrone, 145 Idaho 340 (2008), the Idaho Supreme Court recently addressed a factual scenario similar to the facts at hand in the present case. In said case, husband signed a quitclaim deed purportedly conveying real property located in Idaho, to his wife. Id. at 342. After this deed was signed, wife sought to annul their marriage. Id. Wife moved for partial summary judgment on the issue of whether the real property which was quitclaimed to her, was hers. Id. Husband argued that the sole purpose of the quitclaim deed was to avoid probate, and not unconditionally presently to convey the property to Barmore. Id. The Magistrate ruled in favor of wife. Id. The District Court reversed the Magistrate Court's decision, and thereafter, the matter was appealed to the Supreme Court. Id. One of the main issues addressed by the Supreme Court was whether the parol evidence rule bars admission of evidence of husband's intent. Id. at 344-345. In determining that it does not, the Idaho Supreme Court sated as follows:

> A deed "does not take effect as a deed until delivery with intent that it shall operate. The intent with which it is delivered is important. This restricts or enlarges the effect of the instrument." Bowers v. Cottrell, 15 Idaho 221, 228, 96 P. 936, 938 (1908) (internal quotations omitted). In addition, "[e]ven where the grantee is in possession of the deed, though that may raise a presumption of delivery, still it may be shown by parol evidence that a deed in possession of the grantee was not delivered." Id. (internal quotations omitted). The "controlling element in the question of delivery" is the intention of the grantor and grantee. Id. "The question of delivery is

> one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed." Id. (internal quotations omitted). "[T]he real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered. Estate of Skvorak, 140 Idaho 16, 21, 89 P.3d 856, 861 (2004) (internal quotation omitted).
>
> "It is beyond controversy that the evidence of delivery must come from without the deed. In other words, a deed never shows upon its face nor by the terms thereof a delivery, and parol evidence thereof must necessarily be admitted when the question of delivery arises." Whitney v. Dewey, 10 Idaho 63, 655, 80 P. 1117, 1121 (1905).
>
> Since delivery of a deed is necessary for the deed's validity, any evidence is admissible if it indicates the absence of delivery. Therefore, the parol evidence rule does not bar admission of evidence used for the purpose of determining whether delivery of the relevant deed occurred.

Id. at 344-345.

Wife argued that the factual scenario in Barmore, was identical to that in the case of Bliss, whereby the Idaho Supreme Court refused to consider evidence regarding husband's intent, because doing so would have contradicted the deed's plain language. Id. at 345. The Idaho Supreme Court in Barmore, distinguished Bliss, by stating that "this ruling (in Bliss) was correct because husband was not challenging the validity of the deed itself or that he intended to convey the property, i.e., deliver the deed, but instead challenged only the purpose for delivering the deed, attempting to contradict the plain language of the deed." (parentheses added). Id. Thereafter, the Idaho Supreme Court held that since husband was challenging the delivery of the deed, extrinsic evidence should be permitted, and thus, the parol evidence rule would not bar the admission of evidence regarding

husband's intent in executing the deed. Id.

In the case at hand, Ann did not intend to convey the Etna property to Greg. She testified to the same, when she testified that she did not intend to give Greg a one-half interest in the Etna property, and further, if she knew that by signing the deed, she was giving him a one-half interest in the property, she would have never signed the deed. Ann did not intend to convey (i.e., deliver the deed to) her Etna property. Rather, she was merely attempting to refinance a debt on her separate property. Based upon the same, evidence of Ann's intent in executing the quitclaim deed at issue is not barred by the parol evidence rule, and it should have been considered by the Magistrate in determining whether Greg met his burden of proving a transmutation by clear and convincing evidence.

Greg argues that this issue was not raised by Ann at trial. This argument must fail. The Idaho Supreme Court in Barmore addressed the identical argument, and found that the issue had not been raised for the first time on appeal, and thus was to be considered. Specifically, the Idaho Supreme Court stated as follows:

> However, Barmore argues that Perrone has raised this issue for the first time on appeal, and that it therefore was not preserved for appeal. Barmore is incorrect. Perrone argued to the magistrate court that the intent necessary to effect conveyance of the deed was lacking:
>
> > It is therefore unequivocally clear that Mr. Perrone neither intended a gift or to transmute, presently, his interest in the Star, Idaho property.... Mr. Perrone clearly never intended to either gift or transmute his current interest in the Star, Idaho property but rather to duplicate the Simi Valley, California property (where a quitclaim deed was executed between Mr.

> Perrone and Mrs. Barmore) and where the proceeds were used to obtain the community property residence in Star, Idaho where again Mr. Perrone executed a quitclaim deed to Mrs. Barmore that would only become effective upon his demise, not upon her request for divorce. To validate a transmutation upon these circumstances permits one party to mislead the other party and unfairly gain ownership of property that clearly never intended (sic) to be immediately transmuted.
>
> That argument is identical to an argument that delivery was lacking, since Idaho law has made clear that "delivery" and "intent to convey immediately" are synonymous terms.

Id. Ann, throughout the trial, testified, and argued that she did not intend to convey the Etna property to Greg. Specifically, Ann testified that she had absolutely no intention of giving Greg any interest in her separate property; that she and Greg did not discuss the possibility that Ann was giving Greg a one-half interest in the Etna property before or after Ann signed the quitclaim deed; that the first time Greg brought up the issue that he had a one-half interest in the Etna property, was after the divorce complaint was filed; that she signed numerous documents at the closing, but she did not recall signing the quitclaim deed which was admitted as Plaintiff's exhibit 23; and that if Ann had known she was giving Greg an interest, she would not have signed the quitclaim deed. Ann also argued, in Defendant's Proposed Findings of Fact and Conclusions of Law, which was filed on July 30, 2007, that she had no intention of conveying the Etna property to Greg. R. Vol. I, p. 81-82. Thus, as she argued that she had no intent to immediately convey the property to Greg, she argued that the deed had not been "delivered". The issue was raised below, and Barmore applies to this case.

2. **Even if it is determined that the Magistrate acted correctly by not considering parol evidence before determining whether Ann transmuted her separate property into community property, this case must be remanded to the Magistrate to determine whether the facts surrounding the signing of the quitclaim deed justifies an unequal division of property.**

On June 9, 2009, this Court issued the decision of Dunagan v. Dunagan, 2009 WL 1587787 (2009). This case has not been released, and thus, it is subject to revision or withdrawl. With that noted, and with the due date for Ann's brief being June 17, 2009, this case will be addressed, as written, in this brief.

In Dunagan, wife owned residential property, as her separate property. Id. During the marriage, said property was refinanced and as a condition of the refinancing, the bank required wife to quitclaim her interest in her home to "Kelly Dunagan and Chris Dunagan, wife and husband." Id. During the trial, wife attempted to testify that she signed a lot of paperwork at closing and that she did not realize that she was giving up any interest in her home to Dunagan. Id. She also attempted to testify that she would not have signed the deed had she understood that she was giving an interest in her property to Dunagan. Id. All of this evidence was excluded based upon husband's parol evidence rule objection. Id. The Magistrate concluded that the residential property was transmuted to community property due to the signing of the quitclaim deed. Id. The Magistrate also held that he could not consider the circumstances surrounding the entering into of the quitclaim deed, in determining whether to award an unequal division of property to wife pursuant to I.C. §32-717(1). Id.

On appeal, wife argued that the Magistrate erred in failing to consider the circumstances

surrounding the residential property as a compelling reason to order an unequal disposition of the community property pursuant to I.C. §32-717(1). Id. The Idaho Supreme Court held that the Magistrate should have considered the circumstances surrounding the signing of the quitclaim deed as compelling reasons, outside of the factors specifically listed in I.C. §32-712(1), to determine whether an unequal division of property should be ordered, in favor of wife. Id.

After resolving this issue, the Court then went on to state that the quitclaim deed signed by wife was not ambiguous and thus, it transmuted wife's separate property to community property. Id. However, in doing so, there was no citation, and the Court did not distinguish Hoskinson nor Barmore. In fact, this statement is simply dicta, as the issue of whether the signing of the quitclaim deed prevents the admission of parol evidence in a refinancing situation, was not appealed by wife and thus, it was not directly addressed by this Court in Dunagan. Further, the present case is distinguishable, as Greg failed to object to the contrary intent evidence on parol evidence grounds. Thus, despite this statement in Dunagan, parol evidence must be considered in the present case, before a determination can be made as to whether Greg established, by clear and convincing evidence, that a transmutation took place.

Even if this Court holds that the Magistrate was correct in not considering parol evidence before determining whether a transmutation took place, the ultimate property division must be remanded back to the Magistrate. Ann requested an unequal division of the community property and community debts in her Counterclaim. R. Vol. I, p. 21. Thus, if parol evidence cannot be considered to determine whether a transmutation has occurred, which Ann argues against, said

evidence must be considered by the Magistrate in determining whether Ann is entitled to an unequal division of the community property, pursuant to Dunagan.

3. Ann is entitled to an award of attorney fees pursuant to Idaho Code §12-121 and IAR Rule 41, for being required to defend the appellate issues raised by Greg. She is also entitled to her costs pursuant to IAR Rule 40.

The standard for an award of attorney fees under Idaho Code §12-121, IRCP Rule 54(e)(1), is whether a party has brought or pursued an action or appeal "frivolously, unreasonably, and without foundation". The law is clear. The Magistrate must consider parol evidence when a spouse signs a quit claim deed to she and her husband, regarding her separate property, during a refinance, as found by the District Court. Thus, Greg has pursued this appeal frivolously, unreasonably, and without foundation, and Ann should be awarded her attorney fees.

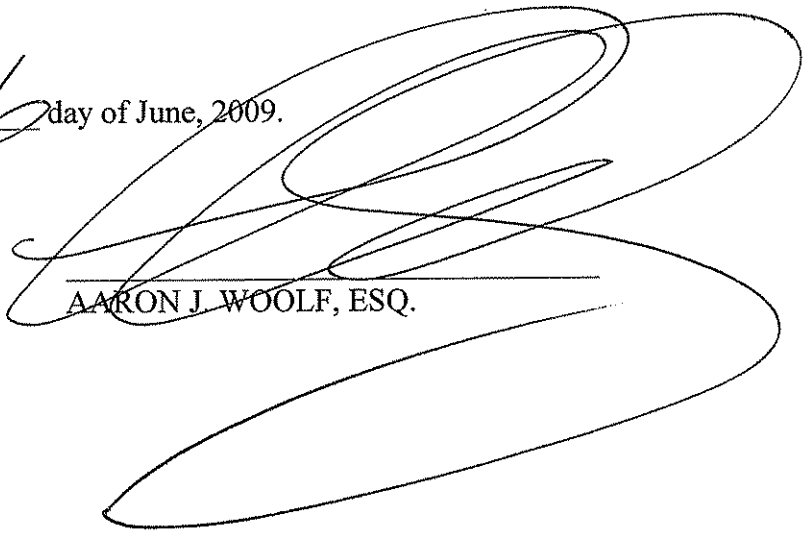
Ann also requests an award of costs pursuant to IAR Rule 40.

VI. CONCLUSION

In conclusion, Ann requests that this Court uphold the District Court's ruling that the Magistrate must consider parol evidence in determining whether Greg can establish, by clear and convincing evidence, that the Etna property was transmuted from Ann's separate property to community property. This is an equitable result. It simply cannot be the law that a spouse can lose $200,000.00 of their separate property, nearly all of which is due to natural appreciation, simply by signing a quitclaim deed during a refinance, when they are required to execute said deed by the lender.

Ann also requests an award of attorney fees and costs.

Respectfully submitted this 16 day of June, 2009.



AARON J. WOOLF, ESQ.

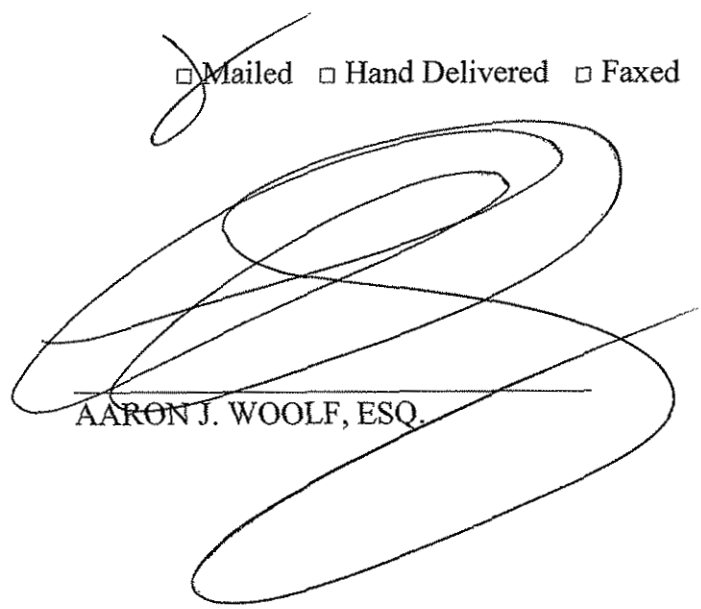
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in Idaho, with my office in Idaho Falls, and that on the 16 day of June, 2009, I served two true and correct copies of the following-described document on the parties listed below.

DOCUMENT SERVED: **RESPONDENT'S BRIEF ON APPEAL**
PARTIES SERVED:

Royce B. Lee, Esq.
Attorney at Law
770 South Woodruff Avenue
Idaho Falls, ID 83401
Fax (208) 524-2051

☐ Mailed ☐ Hand Delivered ☐ Faxed



AARON J. WOOLF, ESQ.